Supreme Court, U.S.
FILED

09-961 FEB 4 - 2010

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

Roy Den Hollander, Sean Moffett, Bruce Cardozo, and David Brannon,
Petitioners on behalf of themselves and all others similarly situated,

v.

United States of America, Director of the U.S. Citizenship and Immigration Services, Director of the Department of Homeland Security, and Director of the Executive Office for Immigration,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a Fed. R. Civ. P. 12(b)(1) dismissal for lack of Article III standing at the pleading stage, did the Second Circuit and district court create a Catch-22 for the plaintiffs-petitioners by requiring them to allege specific facts in their complaint that the Federal secrecy statute (8 U.S.C. § 1367) keeps secret from them?

2. Is it fair for the U.S. Government to keep secret from U.S. citizens, such as the plaintiffs-petitioners, proceedings that make findings of fact that those U.S. citizens committed battery, extreme cruelty or a pattern of violence against their alien spouses, and, if a citizen finds out about such a secret proceeding, the citizen is prevented from submitting evidence on his behalf?

3. Does the Federal secrecy statute encourage alien spouses to file false police complaints and fraudulently obtain temporary restraining orders because the U.S. Government considers documents from such *ex parte* state or local proceedings as primary evidence in its *ex parte* fact-findings of battery, extreme cruelty or a pattern of violence by U.S. citizens?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES.....iv

OPINIONS BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....1

STATEMENT OF THE CASE.....2

A. Secret Proceedings.....3

B. Unfairness.....6

C. Traceability.....6

REASONS FOR GRANTING THE PETITION.....7

I. The Second Circuit and district court created a Catch-22 by requiring plaintiffs-petitioners to allege specific facts in their complaint that the Federal secrecy statute (8 U.S.C. § 1367) keeps secret from them.....7

II. It is fundamentally unfair in a democracy for the Federal government to make findings of fact about its citizens that amount to felonies, misdemeanors, or civil wrongs without allowing those citizens to participate and refute the evidence pre-

sented against them.....10

III. Alien spouses routinely file false police complaints and obtain temporary orders of protection through perjured testimony so as to acquire primary evidence that their citizen spouses committed abuse, which enables the aliens to win permanent residency.....11

CONCLUSION.....14

APPENDICES.....1a

A. Summary Order of U.S. Court of Appeals for the Second Circuit (Dec. 3, 2009).....1a

B. Memorandum and Order of U.S. District Court for the Southern District of New York (December 3, 2008).....5a

TABLE AUTHORITIES

Page

Cases

Bennett v. Spear, 520 U.S. 154 (1997).....13

F.E.C. v. Akins, 524 U.S. 11 (1998).....13

Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978).....12, 13

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951).....7, 11

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).....8

Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990).....8

Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26 (1979).....13

Thomas v. Collins, 323 U.S. 516 (1945).....14

U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950).....7

U.S. v. SCRAP, 412 U.S. 669 (1973).....13, 14

Constitution, Statutes, Regulations

U.S. Const. art. III.....1

Fed. R. Civ. P. 12(b)(1).....1, 12

5 U.S.C. § 552.....10, 11
5 U.S.C. § 552a.....10
8 U.S.C. § 1154.....2, 3
8 U.S.C. § 1186a.....3
8 U.S.C. § 1227.....3
8 U.S.C. § 1367.....1, 2, 6, 7, 10
8 U.S.C. § 1641.....5, 8,

8 C.F.R. § 204.2.....2, 3, 4, 10

61 Fed. Reg. 13,061 (March 26, 1996).....4
62 Fed. Reg. 61,344 (Nov. 17, 1997).....5, 8, 9

Other Authorities

Gordon, *Immigration Law and Procedure*, Matthew Bender, Rev. ed.....2

INS Virtue Memo., 74 Interpreter Releases 795 (May 12, 1997).....2

INS Virtue Memo., 74 Interpreter Releases 971 (June 16, 1997).....10

INS Virtue Memo., 76 Interpreter Releases 162 (Jan. 25, 1999).....4, 10

KPHO TV News, Phoenix, Arizona.....12

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The summary order of the court of appeals (App. 1a) is unpublished but can be found at 2009 U.S. App. LEXIS 26248 and 2009 WL 4350252. The memorandum and order of the district court (App. 5a) is also unpublished but can be found at 2008 U.S. Dist. LEXIS 99809 and 2008 WL 5191103.

JURISDICTION

The court of appeals' judgment was entered on December 3, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 because the action raised federal questions in challenging 8 U.S.C. § 1367 and other federal statutes and regulations as violating the U.S. Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the U.S. Constitution and Fed. R. Civ. P. 12(b)(1) require that a party have standing before a district court can make a decision on the merits of a case.

8 U.S.C. § 1367 keeps secret from U.S. citizens fact-findings that they committed battery, extreme cruelty, or a pattern of violence against their

alien spouses. It allows, however, for the communication of such fact-findings to alien spouses, private or government organizations that provide benefits to alien spouses, and law enforcement agencies.

The statute also prohibits the use of evidence from a citizen spouse that refutes the accusations of battery, extreme cruelty, or violence because the evidence might result in finding the citizen did not commit battery, extreme cruelty, or violence. Such a finding would make the alien spouse ineligible for permanent U.S. residency under 8 U.S.C. § 1154(a)(1)(A)(iii)(bb).

STATEMENT OF THE CASE

Every year, in thousands of proceedings kept secret from U.S. citizens, the U.S. Government finds those citizens committed battery, extreme cruelty or a pattern of violence against their alien spouses. 8 U.S.C. §§ 1154(a)(1)(A)(iii)(bb); 1367(a)(2) & (c); 8 C.F.R. § 204.2(c)(1)(vi); Gordon, *Immigration Law and Procedure*, § 41.05(1), p. 41-32. If by chance some citizens learn of the proceedings and try to submit evidence to refute the accusations against them, their evidence is ignored unless independently corroborated by the U.S. Government. 8 U.S.C. § 1367(a)(1)(A); *INS Virtue Memo.*, 74 Interpreter Releases 795, 796-97 (May 12, 1997). The plaintiffs-petitioners are four of those thousands. They challenged in a putative class action the constitutionality of such proceedings for abridging their right to privacy, to procedural due process and to protect their reputations.

A. Secret Proceedings

When any U.S. citizen, as with the plaintiffs-petitioners, marries an alien and sets up house in America, the U.S. Government allows the alien spouse to live and work here temporarily for two years. After the two years, the alien can become a permanent resident if the alien is still married to the citizen. *See* 8 U.S.C. § 1186a(b)(1)(A)(ii). The marriage, however, may unravel, as did the plaintiffs-petitioners' marriages, before the two years are up because the citizen realizes the alien married just to gain admission to the U.S. If the citizen ends the marriage by divorce or annulment, the alien spouse will be placed in deportation proceedings. 8 U.S.C. § 1227(a)(1)(D)(i). The alien, however, can avoid deportation and obtain permanent residency by accusing the citizen of committing battery, extreme cruelty, or a pattern of violence against the alien. 8 U.S.C. § 1154(a)(1)(A)(iii)(bb).

The alien's accusations are made in a U.S. Citizenship and Immigration Services' ("USCIS") proceeding called "self-petitioning," which means the alien does not need the sponsorship of the citizen spouse to acquire permanent residency. 8 C.F.R. § 204.2(c). The entire self-petitioning process, including all fact-findings, is kept secret from the citizen spouse. The USCIS, based on evidence from the alien spouse but not the citizen, makes findings of fact that the citizen committed battery, extreme cruelty, or a pattern of violence against the alien. "[A] finding that the spouse ... has been 'battered or subjected to extreme cruelty' is one of the threshold elements of the ... [self-petitioning]

claim." *INS Virtue Memo.*, 76 Interpreter Releases 162, 163 (Jan. 25, 1999).

USCIS considers two levels of evidence from the alien spouse in reaching its fact-findings: "primary" and other credible evidence. 8 C.F.R. § 204.2(c)(2)(i) & (iv). "[M]ore weight will be given to primary evidence and evidence provided in court documents, ... police reports, and other official documents...." 61 Fed. Reg. 13,061, 13,068 (March 26, 1996)(copies are sufficient unless USCIS requests originals). Such primary evidence includes (1) police complaints filed by alien spouses and (2) temporary restraining orders, all of which depend solely on statements made by alien spouses in *ex parte* proceedings. 8 C.F.R. § 204.2(c)(2)(iv).

The plaintiffs-petitioners alleged that their alien spouses filed fraudulent police complaints, which led to arrests for two of them, and obtained temporary restraining orders based on perjured testimony in order to obtain primary evidence for their self-petitioning applications for permanent residency. (Amended Complaint ¶¶ 69-70, 84, 89, 95, 103-04, 110, 119-21, 125). The USCIS allegedly relied on documentation from those state and local *ex parte* proceedings to make findings of fact that the plaintiffs-petitioners committed battery, extreme cruelty, or a pattern of violence against their alien wives. (Amended Complaint ¶¶ 4, 9-12, 15, 48-49, 84, 95, 110, 125).

Two of the plaintiffs-petitioners also alleged that their alien spouses were receiving government benefits through non-governmental, private organi-

zations ("NGOs"), Amended Complaint ¶¶ 93, 122, and alleged that in order to receive such benefits, the U.S. Government communicated privacy and defamatory information about the two petitioners to employees in the respective NGOs, Amended Complaint ¶¶ 21-23.

When NGOs provide benefits to allegedly abused alien spouses, the NGOs must determine whether the alien spouse was abused and whether there is a connection between the abuse and the need for a benefit. 8 U.S.C. § 1641(c)(1)(A); Qualified Alien Status and Eligibility Under Title IV, 62 Fed. Reg. 61,344, 61366(I)(2) & (3)(Nov. 17, 1997). In order to do that, the NGO verifies with USCIS whether the alien spouse has a *prima facie* case or has been approved for permanent residency, which means communication to the NGO that the citizen spouse is accused of or was found to have committed battery, extreme cruelty, or a pattern of violence. Id. at 61,344.

The court of appeals and district court ruled that none of the plaintiffs-petitioners suffered or would suffer injury from the dissemination of information about the accusations made to the USCIS or the USCIS's fact-findings that the plaintiffs-petitioners committed battery, extreme cruelty, or a pattern of violence. The Second Circuit's Summary Order, p. 3, App. 3a-4a, states:

> [T]his injury is purely speculative—plaintiffs have failed to allege that any information concerning them has or will likely be disseminated....

> While ... [8 U.S.C. § 1367 (b)(2)(4)(5) & (7)] does permit limited disclosure of information to certain third parties such as agencies that provide public benefits ... there is no reason to believe that such information would include any information about plaintiffs themselves.

The district court ruled, "[n]one of the Plaintiffs alleges that any disclosure in fact occurred, or that any government entity has threatened to authorize such. Thus, any alleged injury is purely speculative." (S.D.N.Y. Memorandum & Order, p. 6, App. 12a).

B. Unfairness

Neither the Second Circuit nor the district court considered it unfair that U.S. citizens, such as the plaintiffs-petitioners, are shutout from Federal proceedings that make fact-findings about them committing battery, extreme cruelty, or a pattern of violence. (Second Circuit Summary Order, p. 3, App. 4a; S.D.N.Y. Memorandum & Order, p. 6, App. 11a).

C. Traceability

The Second Circuit held that the plaintiffs-petitioners' allegations of injuries from fraudulent police complaints and fraudulently obtained temporary protection orders were not traceable to the self-petitioning process giving "more" evidentiary weight in making findings of abuse to state and lo-

cal documents created in *ex parte* proceedings. Nor were such *ex parte* proceedings traceable to the USCIS's fact-finding process that shuts out the very person most likely to refute the accusations of abuse—the one against whom they are made. (Second Circuit Summary Order, pp. 2-3, App. 2a-3a). The district court reached the same conclusion but for a different reason: "Plaintiffs argue that the [self-petitioning fact-finding process] encourages fraudulent police complaints, arrests, and temporary restraining orders. However, that prospective harm can be addressed in state court proceedings." (S.D.N.Y. Memorandum & Order, p. 6, App. 11a).

REASONS FOR GRANTING THE PETITION

Secrecy "'provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.' Appearances in the dark are apt to look different in the light of day." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171 (1951) (Frankfurter J., concurring)(internal quote *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 551 (1950)(Justices Jackson, Black and Frankfurter dissenting)).

I. The Second Circuit and district court created a Catch-22 by requiring plaintiffs-petitioners to allege specific facts in their complaint that the Federal secrecy statute (8 U.S.C. § 1367) keeps secret from them.

The secrecy statute prevented two of the plaintiffs-petitioners from determining at the pleading stage what specific information about them was disseminated by USCIS to employees of private organizations providing benefits to their alien spouses. The Second Circuit and district court, however, demanded specific allegations of actual or threatened disclosure that were impossible to make because of the secrecy statute. As a result, the Second Circuit and district court ruled the allegations of privacy invasion and defamation were "speculative."

Besides the obvious Catch-22, the rulings misconstrued *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" Id. at 561 (internal quotation *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)). The Second Circuit specifically relied on *Lujan v. Defenders of Wildlife* to hold the allegations of privacy invasion and defamation "speculative." (Second Circuit Summary Order p. 3, App. 3a-4a).

Federal law required that the NGOs, which provided Government benefits to two of the plaintiffs-petitioners' spouses, determine from USCIS whether the alien spouses were abused and whether there was a connection between the abuse and the need for benefits. 8 U.S.C. § 1641(c)(1)(A); Qualified Alien Status and Eligibility Under Title

IV, 62 Fed. Reg. 61,344, 61366(I)(2) & (3). Since the alien spouses, as alleged, were using the self-petitioning process and received benefits, Amended Complaint ¶¶ 93, 95, 122, 125, such determinations were made by the NGOs verifying with USCIS the accusations or fact-findings of abuse against the two petitioners and the connection of that abuse with the aliens' needs for benefits. Qualified Alien Status and Eligibility Under Title IV, 62 Fed. Reg. 61,344. Private and defamatory information were therefore disseminated, as alleged, to third parties who were not in the Government—that is an injury.

The Second Circuit and district court failed to consider the general allegations to include specific allegations of injury in that privacy and defamatory information was disseminated to certain employees of those NGOs.

At the very least, the Second Circuit should have required limited discovery on the dissemination of information concerning the plaintiffs-petitioners committing battery, extreme cruelty, or a pattern of violence against their alien spouses.

Finding out at the pleading stage that two of the plaintiffs-petitioners' alien spouses were receiving Government benefits was purely fortuitous given the secrecy statute, although logic indicates the alien spouses of the other two also received benefits, since such Government largess is available simply for the asking.

II. It is fundamentally unfair in a democracy for government to make findings of fact about its citizens that amount to felonies, misdemeanors, and civil wrongs without allowing those citizens to participate and refute the evidence presented against them.

The USCIS "adjudicate[s] ... self petitions," which requires the threshold fact-finding that a citizen spouse committed battery, extreme cruelty, or a pattern of violence against an alien spouse. *INS Virtue Memoranda*, 74 Interpreter Releases 971, 972 (June 16, 1997); 76 Interpreter Releases 162, 163. The citizen spouse is prohibited from participating in the determination of what he is alleged to have done, 8 U.S.C. § 1367(a)(1) & (2), which may include rape, forced prostitution, any act of violence, or forceful detention, 8 C.F.R. § 204.2(c)(1)(vi).

The plaintiffs-petitioners alleged that USCIS made determinations of them committing acts against their alien spouses that amounted to felonies, misdemeanors, or civil wrongs. (Amended Complaint ¶¶ 14, 27, 70, 89, 104, 120, 190, 199). The plaintiffs-petitioners do not know, nor can they find out, exactly what the Government determined they did because of the secrecy statute, 8 U.S.C. § 1367. Even the Freedom of Information and Privacy Acts, 5 U.S.C. §§ 552 & 552a, are of no help because the Department of Justice considers the fact-findings compiled for law enforcement purposes and any release of information would constitute an "unwarranted invasion of the personal privacy of third parties [the alien spouses]" under 5

U.S.C. § 552(b)(7)(C). It is not the alien spouses who were allegedly found to have committed reprehensible acts but the plaintiffs-petitioners. Yet the petitioners are the ones who cannot access, refute, or correct those findings.

Ironically, the state courts dismissed all the state proceedings initiated by the alien spouses against the plaintiffs-petitioners, except for two permanent orders of protection. (Amended Complaint ¶¶ 69, 89, 91, 104, 107, 120-21). However, USCIS, as alleged, found the plaintiffs-petitioners to have committed wrongful acts in the very same fact situations that the states—using the adversarial system—found no wrong doings.

"The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy those men may be; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *McGrath*, 341 U.S. 123, 170 (Frankfurter J., concurring).

III. Alien spouses routinely file false police complaints and obtain temporary orders of protection through perjured testimony so as to acquire primary evidence that their citizen spouses committed abuse, which enables the aliens to win permanent residency.

The Second Circuit held that the filing of false police complaints and obtaining temporary protection orders based on false testimony were not

done to acquire primary evidence of abuse for the self-petitioning process, but were actions "independent" of the alien spouses trying to win permanent residency. (Second Circuit Summary Order, p. 2, App. 2a-3a). This holding is out of line with logic and other Supreme Court decisions. It makes no sense for aliens to go through the always-trying process of litigation when there is no ultimate objective of value.

The Second Circuit, as it was required to do on a Rule 12(b)(1) dismissal, accepted as true the allegations that the police complaints and temporary protection orders were based on false accusations. Since the complaints and orders were fraudulent, their purposes were not to protect the alien spouses. How could they be—they were based on made-up facts. The only logical reason for the false accusations was to produce documents for use in acquiring permanent residency. This is especially evident when considering that non-profit, immigrant organizations coach alien spouses on what to say, what to do, and how to act in order to gain permanent residency through the self-petitioning process. KPHO TV News, Phoenix, Arizona, http://www.kpho.com/news/19329313/detail.html, April 29, 2009.

Real and immediate injuries can result from a Federal statute that provides incentives for third parties to act in a way that harms others. Standing causation requires that the asserted injuries are the consequences of or fairly traceable to the Government's conduct. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 74 (1978)(citing

Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41 (1979)). Standing injuries may result from action by third parties because fairly traceable injuries do not require the defendants' actions to be the last step in the chain of causation, *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997), and it matters not whether that last step is a discretionary decision, *see F.E.C. v. Akins*, 524 U.S. 11, 25 (1998), for standing can be based on the substantial likelihood of third parties behaving in a particular way in response to a statute, *Duke Power Co.*, 438 U.S. at 74-75.

In *Duke Power*, the Supreme Court found injury to plaintiffs from a statute limiting the liability for potential accidents at nuclear power plants. The Supreme Court held the statute would encourage the construction of plants by third parties that when finally completed would create an apprehension in those near the plants, the plaintiffs, of increased radioactivity, reduced property values, and increased water temperature. *Duke Power*, 438 U.S. at 73.

Standing injury was also found in *U.S. v. SCRAP*, 412 U.S. 669 (1973), where the Government decided to raise railroad transportation rates. The Supreme Court reasoned that the increase in rates would lead one group of third parties, the recycling industry, to reduce the availability of recyclable goods because higher rates would make them less profitable. The public, therefore, would buy fewer recyclable goods but more of the cheaper non-recyclable goods, which would be discarded as refuse in national parks. Another third party

group, manufacturers, would use more natural resources to meet the demand for the non-recyclable goods. All of which taken together would harm the use and enjoyment of nature by the plaintiffs, which was an injury. Id. at 686-88.

The Second Circuit and district court ignored this type of reasoning. They in effect made a decision that as a matter of law alien spouses, the third parties, are not substantially likely to institute fraudulent *ex parte* local and state proceedings so they can use the documents generated as primary evidence in finding their citizen spouses committed abuse. Under the lower courts decisions, the prize of permanent residency in America (where the average annual family income is $60,000) does not cause persons from the poorest nations to file false charges to assure their winning that prize.

CONCLUSION

The petition for writ of certiorari should be granted so as to once again remind the politically powerful why the adversarial process is a key principle of this Republic: the founders "did not trust any government to separate the true from the false for us." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

February 2, 2010

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APPENDIX

APPENDICES

Page

A. Summary Order of U.S. Court of Appeals for the Second Circuit (Dec. 3, 2009).....1a

B. Memorandum and Order of U.S. District Court for the Southern District of New York (December 3, 2008).....5a

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A. Summary Order of U.S. Court of Appeals for the Second Circuit (Dec. 3, 2009)

Roy Den Hollander, Sean Moffett, Bruce Cardozo, David Brannon, Plaintiffs v. United States

No. 08-6183-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

2009 U.S. App. LEXIS 26248

December 3, 2009, Decided

NOTICE: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Appeal from the United States District Court for the Southern District of New York (Pauley, J.). *Hollander v. Chertoff, 2008 U.S. Dist. LEXIS 99809 (S.D.N.Y., Dec. 3, 2008)*

For Plaintiffs-Appellants: ROY DEN HOLLANDER, New York, NY.

For Defendants-Appellees: NATASHA OELTJEN, Assistant United States Attorney (for Preet Bharara, United States Attorney for the Southern District of New York), New York, NY.

Present: AMALYA L. KEARSE, ROBERT A. KATZMANN, PETER W. HALL, Circuit Judges.

SUMMARY ORDER

ON CONSIDERATION WHEREOF, it is hereby ORDERED, ADJUDGED, and DECREED that the judgment of the district court be and hereby is AFFIRMED.

Plaintiffs Roy Den Hollander, Sean Moffett, Bruce Cardozo, and David Brannon appeal from the decision of the district court dismissing their suit pursuant to *Federal Rule of Civil Procedure 12 (b)(1)* for lack of Article III standing. We assume the parties' familiarity with the facts and procedural history of the case.

Plaintiffs argue that they have standing to bring suit because the Violence Against Women Act, by allowing aliens who have been battered or subject to extreme cruelty by their spouses to self-

petition for legal permanent resident status, created incentives for their alien wives and ex-wives to file false police complaints and false applications for temporary restraining orders against them. This argument lacks merit because plaintiffs' injury is not fairly traceable to defendants, but to the independent actions of their wives or ex-wives who are not before this Court. *See Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-43, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976)*. The links in the chain of causation here, which depend upon the independent actions of (1) plaintiffs' wives or ex-wives, (2) state courts and state officials, and in some cases (3) private employers are too attenuated and too numerous to satisfy the standing requirement. *See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* ("the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court") (quotation marks and alterations omitted). Moreover, similar "incentive" arguments have been rejected as a basis for establishing causation. *See, e.g., Linda R.S. v. Richard D., 410 U.S. 614, 618, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973)* (concluding that the incentive created by the prospect of jail time was not sufficient to support finding that requested prosecution would result in the payment of child support).

Plaintiffs further argue that the government or third parties have or will disseminate information about them that was gathered during the self-petitioning process, harming their reputation and privacy. Plaintiffs fail to state an injury-in-fact, however, because this injury is purely speculative--

plaintiffs have failed to allege that any information concerning them has or will likely be disseminated. *See Lujan, 504 U.S. at 560* (an injury must be "actual or imminent, not conjectural or hypothetical") (internal quotation marks omitted). While the Violence Against Women Act does permit limited disclosure of information to certain third parties such as agencies that provide public benefits, *see 8 U.S.C. §§ 1367(a), (b)*, there is no reason to believe that such information would include any information about plaintiffs themselves. Moreover, those parties to whom dissemination is permitted are bound by the statute's non-disclosure provisions. *See id. § 1367(c)*. Similarly, plaintiffs' argument that they are injured because they are constrained in their marital affairs is purely speculative. Nowhere in plaintiffs' complaint do they allege that they did not divorce because of the contested provisions or would marry an alien in the future but for the contested provisions. Finally, plaintiffs are not injured by being "shut out" of the self-petitioning process because they cannot show that they have been injured as a result of the self-petitioning process.

We have considered the remainder of plaintiffs' arguments and conclude that they lack merit.

Accordingly, for the foregoing reasons, the judgment of the district court is hereby

AFFIRMED.

B. Memorandum and Order of U.S. District Court for the Southern District of New York (Dec. 3, 2008)

Roy Den Hollander, Sean Moffett, Bruce Cardozo, David Brannon, Plaintiffs, v. Chertoff et al.,

08 Civ. 1521 (WHP)

U. S. DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

2008 U.S. Dist. LEXIS 99809

December 3, 2008, Decided
December 3, 2008, Filed

SUBSEQUENT HISTORY: Affirmed by Den Hollander v. United States, 2009 U.S. App. LEXIS 26248 (2d Cir. N.Y., Dec. 3, 2009)

WILLIAM H. PAULEY, III, United States District Judge.

MEMORANDUM & ORDER

Plaintiffs Roy Den Hollander ("Hollander"), Sean Moffett ("Moffett"), Bruce Cardozo ("Cardozo"), and David Brannon ("Brannon") bring this putative class action seeking a declaratory judgment that certain provisions of the Violence Against Women Act ("VAWA"), the Illegal Immigration Reform and Immigrant Responsibility Act, and the Immigration and Nationality Act, unconstitutionally discriminate against American men.

Plaintiffs also seek injunctive relief. Defendants move to dismiss pursuant to *Rule 12(b)(1)* for lack of standing and *Rule 12(b)(6)* for failure to state a claim upon which relief may be granted. For the following reasons, Defendants' motion to dismiss for lack of standing is granted.

BACKGROUND

I. *VAWA*

Pursuant to VAWA, an alien spouse can file a petition with the Attorney General for immigrant classification (the "VAWA Process"). *See 8 U.S.C. § 1154(a)(1)(A)(iii)*. The VAWA Process allows non-citizens who have been subjected to domestic violence to legalize their immigration status without the abusive spouse's participation. The alien spouse must show, *inter alia*, that she has been battered by a citizen or lawful permanent resident spouse during the marriage. *See 8 C.F.R. § 204.2(c)(1)(i)*.

VAWA prevents the Attorney General or any federal agency from making an "adverse determination of admissibility or deportability of an alien . . . using information furnished solely by . . . a spouse or parent who has battered the alien or subjected the alien to extreme cruelty." *8 U.S.C. § 1367(a)(1)*. It also prevents the Attorney General from permitting "use by or disclosure to anyone . . . of any information which pertains to an alien who is the beneficiary" of a VAWA application. *8 U.S.C. § 1367(a)(2)*. However, there are certain limited exceptions to non-disclosure. Plaintiffs challenge those provisions that allow: (1) disclosure by the Attorney General to law enforcement officers for

law enforcement purposes; (2) disclosure by the Attorney General to Federal, State, and local agencies for eligibility determinations under the statute; and (3) disclosure by government entities to non-profit victims' service providers for the purpose of assisting victims. *See 8 U.S.C. § 1367(b).*

II. *The Amended Complaint*

On a motion to dismiss, the allegations of the Amended Complaint are accepted as true. While neither a model of clarity, nor a "short and plain statement" as envisioned by *Rule 8*, the pertinent factual assertions for each Plaintiff are summarized below.

A. *Roy Den Hollander*

In October 2000, Hollander sought to divorce his wife, a Russian citizen, and refused to sponsor her for permanent residency. (First Amended Class Action Civil Rights Complaint dated May 2, 2008 ("Compl.") PP 64-66). She then utilized VAWA to seek permanent residency by filing a complaint falsely accusing Hollander of extortion and threats. (Compl. P 67.) In January 2001, she obtained a temporary order of protection against Hollander, which was later dismissed for failure to prosecute. (Compl.. P 69.)

B. *Sean Moffett*

In May 2007, Moffett's wife, a Guatemalan citizen, accused Moffett of assault and had him arrested. (Compl. P 89.) Moffett spent three nights in jail, while his wife "looted his bank account." (Compl. P 90.) The couple divorced in April 2008. (Compl. P 94.) Moffett alleges that his ex-

wife is currently pursuing permanent residency through the VAWA Process. (Compl. P 95.)

C. *Bruce Cardozo*

Cardozo's wife, a non-citizen, obtained a temporary order of protection by falsely claiming that Cardozo "beat her on a monthly basis." (Compl. P 105.) Cardozo asserts that he could not change jobs for four years because "corporations check whether applicants have restraining orders filed against them, and if so, usually deny them a job." (Compl. P 108.) Cardozo's wife "subsequently used VAWA to acquire permanent residency." (Compl. P 110.)

D. *David Brannon*

In connection with a divorce proceeding, Brannon's wife, a Russian citizen, accused him of "threatening to kill her" and obtained an order of protection, forcing him out of his home. (Compl. PP 119-20.) Brannon also alleges that his alien wife is seeking permanent residency through the VAWA Process. (Compl. P 125.)

Plaintiffs claim that VAWA's non-disclosure and evidentiary requirements deprive them of due process. Specifically, they assert that they are prevented from participating in proceedings in which they are "accused of and adjudged responsible for 'battery,' 'extreme cruelty,' [or an] 'overall pattern of violence.' (Compl. P 145.) They also claim that the exceptions in VAWA for disclosure of spousal abuse have harmed their reputations.

Plaintiffs assert two equal protection claims: (1) that VAWA's protections apply only to alien spouses but not U.S. citizens, (Compl. PP 158-59); and (2) that because VAWA is used overwhelm-

ingly by alien females against their citizen male husbands, it discriminates on the basis of gender, (Compl. PP 160-61).

Plaintiffs also allege *First Amendment* claims, asserting that the terms "battery," "extreme cruelty," and "overall pattern of violence" are vague and overbroad and "effectively deter or chill a class members' freedom of speech." (Compl. P 197.)

Finally, Plaintiffs contend that VAWA constitutes a bill of attainder because it "overwhelmingly punish[es] an unpopular group," namely American men who "look overseas for wives." (Compl. P 205.)

DISCUSSION

I. *Legal Standard*

Article III standing is "the threshold question in every federal case, determining the power of the court to entertain suit." *Ross v. Bank of Am., N.A. (USA), 524 F.3d 217, 222 (2d Cir. 2008)* (quoting *Warth v. Seldin, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975))* (internal quotation marks and citation omitted). "A court presented with a motion to dismiss under both *Rule 12(b)(1)* and *12 (b)(6)* must decide the jurisdictional question first because a disposition of a Rule 12(b)(6) motion is a decision on the merits, and therefore, an exercise of jurisdiction." *Adamu v. Pfizer, Inc., 399 F. Supp. 2d 495, 500 (S.D.N.Y. 2005).*

In considering a Rule 12(b)(1) motion, all facts alleged in the complaint are taken as true and all reasonable inferences are drawn in Plaintiffs' favor. *Bldg. & Constr. Trades Council of Buffalo, N.Y. & Vicinity v. Downtown Dev., Inc., 448 F.3d 138, 144 (2d Cir. 2006).* "Dismissal is inappropriate

unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief." *Raila v. U.S., 355 F.3d 118, 119 (2d Cir. 2004).* However, "the standing inquiry has been especially rigorous when reaching the merits of the dispute would force the court to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Nat'l Council of La Raza v. Gonzales, 468 F. Supp. 2d 429, 436 (E.D.N.Y. 2007)* (quoting *Raines v. Byrd, 521 U.S. 811, 819-20, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997)), aff'd, 283 Fed. App'x 848 (2d Cir. 2008).*

To establish standing under Article III, Plaintiffs bear the burden of demonstrating: (1) an injury-in-fact that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) causation; and (3) that it is likely, not speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).*

A. *Injury-in-Fact*

The injury-in-fact prong requires a plaintiff to establish he has "sustained or is immediately in danger of sustaining some direct injury . . . that must be both real and immediate." *City of Los Angeles v. Lyons, 461 U.S. 95, 102, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)* (internal quotation marks and citations omitted). "Allegations of a subjective chill are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm[.]" *Laird v. Tatum, 408 U.S. 1, 13-14, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972)* (internal

quotation marks omitted). With respect to a class action, the named plaintiffs "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Doe v. Blum, 729 F.2d 186, 190 n.4 (2d Cir. 1984)* (citing *Warth, 422 U.S. at 502*).

That the VAWA Process excludes Plaintiffs does not constitute an injury-in-fact. Plaintiffs point to no element of the VAWA statutory scheme that results in any actual detriment to them. VAWA does not provide for criminal or civil proceedings against Plaintiffs, and no such proceeding is alleged to have been instituted against any of them. Instead, Plaintiffs argue that the VAWA Process encourages fraudulent police complaints, arrests, and temporary restraining orders. However, that prospective harm can be addressed in state court proceedings. *See Nat'l Council of La Raza, 468 F. Supp. 2d at 439* (finding no injury where plaintiff members who were detained for their immigration status would have due process opportunities to challenge the basis of their arrest).

The VAWA Process provides a mechanism to adjudicate an alien spouse's petition for immigrant classification. No determination is made regarding Plaintiffs alleged conduct and, contrary to the Amended Complaint, they are not "adjudged responsible." (Compl. P 145.) That each of the plaintiffs may desire to see his former spouse deported is not a cognizable interest sufficient to confer standing. *See Linda R.S. v. Richard D., 410 U.S. 614, 619, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973)* ("[A] citizen lacks standing to contest the policies of

the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.").

Plaintiffs also fail to allege an injury-in-fact resulting from the disclosure of alleged domestic abuse by their alien spouses in the VAWA Process. None of the Plaintiffs alleges that any disclosure in fact occurred, or that any government entity has threatened to authorize such disclosure. Thus, any alleged injury is purely speculative. *See Lyons, 461 U.S. at 102; see also Nat'l Council of La Raza, 468 F. Supp. 2d at 441* ("[S]tylizing a speculative injury as a present fear that the ultimate harm might occur does not change the conjecture of a future harm into an injury-in-fact.").

Similarly, Plaintiffs do not allege injury-in-fact with respect to their *First Amendment* or Bill of Attainder claims. *See Laird, 408 U.S. at 13* ("[T]o entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action . . . .") (quoting *Ex parte Levitt, 302 U.S. 633, 634, 58 S. Ct. 1, 82 L. Ed. 493 (1937)).* The Amended Complaint is bereft of any such allegation.

Accordingly, Plaintiffs fail to meet their burden of establishing an injury-in-fact sufficient to support Article III standing.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss for lack of Article III standing is granted. The Clerk of Court is directed to mark this case closed.

Dated: December 3, 2008
New York, New York
SO ORDERED:
/s/ William H. Pauley III
WILLIAM H. PAULEY III
U.S.D.J